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Supreme Court, U.S.
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No. 92-1851

In The

Supreme Court of the United States

October Term, 1992

ROBERT DAILEY; REGGIE LEACH, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

NATIONAL HOCKEY LEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The other Respondents are:

THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY, JOHN ZIEGLER, BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC., CALGARY FLAMES HOCKEY CLUB, CHICAGO BLACKHAWK HOCKEY TEAM, INC., DETROIT RED WINGS, INC., EDMONTON OILERS HOCKEY, LTD., 8 HOCKEY VENTURES, INC., HARTFORD WHALERS HOCKEY CLUB, LE CLUB DE HOCKEY CANADIEN INC., LE CLUB DE HOCKEY LES NORDIQUES, L.A. KINGS, LTD., MAPLE LEAF GARDENS LIMITED, MEADOWLANDERS, INC., NASSAU SPORTS, NEW YORK RANGERS HOCKEY CLUB (A DIVISION OF MADISON SQUARE GARDEN CENTER, INC.), NIAGARA FRONTIER HOCKEY, L.P., NORTHSTAR HOCKEY CLUB, PHILADELPHIA FLYERS LIMITED PARTNERSHIP, PITTSBURGH PENGUINS, INC., ST. LOUIS BLUES HOCKEY CLUB, L.P., VANCOUVER HOCKEY CLUB, LTD., AND WASHINGTON HOCKEY LIMITED PARNTERSHIP.

COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the court below correctly apply the well-settled principles of subject matter jurisdiction set forth in *Princess Lida of Thurn & Taxis v. Thompson,* 305 U.S. 456 (1939), when it dismissed an ERISA suit that sought relief in connection with the funding, administration, management and handling of a pension plan and trust located in Canada based on the fact that a similar suit, involving virtually identical issues and parties, and the same pension trust *res,* was pending in the Ontario Court of Justice in Canada where the same relief is available?

RULE 29.1 STATEMENT

The following entities are the parent corporations or principal shareholders of the identified corporate Respondents:

Respondent	*Principal Shareholder*
Chicago Blackhawk Hockey Team, Inc.	Consolidated Enterprises, Inc.
Edmonton Oilers Hockey, Inc.	Pocklington Financial Corp.
Le Club de Hockey Canadien, Inc.	The Molson Companies, Ltd.
New York Rangers Hockey Club	Madison Square Garden Corporation (Gulf & Western Corp.)
Vancouver Hockey Club, Ltd.	Northwest Sports Enterprises, Ltd.

The following direct or indirect subsidiaries of Respondent The Manufacturers Life Insurance Company are less than wholly owned:

Underwriters International Inc.

Manulife (Singapore) PTE Ltd.

P.T. Asuransi Jiwa Dharmala Manulife

Young Poon Manulife Insurance Company

159139 Canada Inc.

Altamira Management Ltd.

FirstLine Trust Company

Family Financial Services Limited

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COUNTER STATEMENT OF THE CASE

On June 6, 1991, Petitioners Robert Dailey and Reggie Leach, two former professional hockey players who had played for teams in the National Hockey League ("NHL"), filed a class action complaint in the United States District Court for the District of New Jersey ("the New Jersey action") against the NHL, the

President of the NHL, the NHL Pension Society, twenty-one member clubs of the NHL and the Manufacturers Life Insurance Company ("Respondents"). The Complaint asserted claims involving the "funding, administration, management and handling" of the National Hockey League Club Pension Plan and Trust ("the Pension Plan and Trust") and centered on the treatment of "surplus" funds[1] which they alleged built up in the Pension Plan and Trust during the 1970-1987 period.

Petitioners sought to represent a class of professional hockey players and their beneficiaries who were participants in the Pension Plan and Trust during the period from 1966 through 1987. They alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA") and sought injunctive relief, including an order compelling an accounting and reallocation of the surplus to purchase additional benefits for the specific group of retired players in the class they represent. They also sought removal of the NHL Pension Society as Trustee of the Pension Plan and Trust.

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1. Until 1986, substantially all of the contributions to the Pension Plan and Trust were invested in a group annuity contract, No. GA 550, between the Pension Society and Respondent The Manufacturers Life Insurance Company ("Manulife"), which is headquartered in Toronto, Ontario. Complaint, ¶¶ 9, 61 (26-A). The Manulife group annuity contract was an "experience rated contract" which, according to plaintiffs, means that "to the extent that Manulife was able to earn a rate of return on the funds deposited in the contract by the Pension Society in excess of the internal rate of return on which the contract was based, surplus funds would be generated under the contract." *Id.* ¶ 62. (26-A). Both the New Jersey and the Canadian action (described below) involve complaints by former players regarding the "experience rated credits" negotiated between Manulife and the Pension Society, which the plaintiffs in both cases call "surplus".

Although Respondents contest many of the facts alleged and conclusions contained in the Complaint, as well as in the Statement of the Case included in the Petition, these issues need not be resolved for purposes of the Petition or the appeal in general.

Central to the decision below was the fact that on April 26, 1991, before the New Jersey action was filed, seven other former hockey players filed an action in the Ontario Court of Justice in Ontario, Canada ("the Canadian action") on behalf of a slightly different class of hockey players, but one which includes both petitioners, Dailey and Leach. The Canadian action raised virtually identical issues and sought identical types of relief as were later requested in this action. Plaintiffs in both cases sought (1) injunctive relief preventing the removal of any additional surplus funds from the Pension Plan and Trust and requiring that all surpluses be returned to the Pension Plan and Trust and then allocated to the accounts of the represented former players with interest, (2) an accounting for all surpluses generated by the Pension Plan and Trust since its inception, (3) removal and replacement of the Pension Society as Trustee, and (4) an accounting and award of money damages for alleged breach of contract and fiduciary duty.

Although not noted by Petitioners, the trial court in the Canadian action has entered judgment, now on appeal, in favor of plaintiffs and has awarded almost all of the relief sought by plaintiffs (20-A).

Plaintiffs in both cases based their claims on an interpretation of pension plan provisions contained in a 1967 agreement among certain of the respondents entitled the National Hockey League Club Pension Plan and Trust ("the Agreement"). The Agreement provided defined pension benefits for former NHL players, regardless of where the player resides or where his former club is located. The Pension Plan and Trust is registered both in Canada and in the United States, but under United States law is a "foreign situs" trust, because it designates the Pension Society as the trustee and the Pension Society is located in Canada.

The Agreement includes a choice-of-law provision specifying

that it "shall be construed according to the laws of Canada and the Provinces thereof." The choice-of-law provision also provides that the Agreement shall be interpreted and administered "in a manner consistent with the requirements of § 401(a) of the Internal Revenue Code of 1954 of the United States of America, as it may hereafter be amended, or of any provision of any future Internal Revenue Code of similar scope and purpose." There is no dispute that ERISA applies to the NHL Pension Plan and Trust.

The parties also agree that, but for the legal claim under ERISA in the New Jersey action, and a slightly different makeup of the class of players, the factual and legal claims in the Canadian and New Jersey cases are substantially the same.[2]

SUMMARY OF ARGUMENT

There are no special or important reasons for granting the Petition in this case. The issue determined below is unique and unlikely to recur. No other court has ever resolved the question, and there is, therefore, no conflict among the United States Courts of Appeals. The court below reached the correct conclusion based on application of settled legal principles. The Petition should be denied.

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2. While both cases center on the appropriate disposition of "surplus," ERISA contains no specific provisions dealing with pension plan "surplus." Nor does it define the term "surplus." It does require, however, that all plan assets be used "for the exclusive benefit" of plan participants. This ERISA requirement is also incorporated as an explicit term of the Agreement so it must be complied with regardless of where these issues are litigated.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED IN THIS CASE IS UNLIKELY TO RECUR.

Both Petitioners and the Amicus, National Hockey League Players Association ("NHLPA")[3], make some attempt to portray the decision of the court below as far-reaching and widely-applicable.[4]

These attempts to characterize the Court of Appeals' decision as important fail, however, because the decision applies only to an extremely rare, if not unique, factual situation. This is borne out by the fact that Petitioners, the district court and the Court of Appeals were unable to locate even one remotely similar case. Indeed, the

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3. The fact that the players' union has chosen at this juncture, for the first time in either action, to support the relief sought by Petitioners is curious in light of the fact that a substantial portion of the "surplus" pension funds at issue in this suit was allocated in order to fund pension benefits for certain players pursuant to a Collective Bargaining Agreement negotiated on the players' behalf by the NHLPA. (Petition at 7). The NHLPA would seem to have interests that conflict with the plaintiffs in both this and the Canadian lawsuits since plaintiffs seek to undo this aspect of the Collective Bargaining Agreement.

4. For example, Petitioners assert that "hundreds of nations may now be able to control the pensions of American workers without regard to ERISA" and "render ERISA powerless to provide any protections to the American worker." Petition at 4. The Amicus does not join in this unrestrained hyperbole, but only goes so far as to venture that other actions "may arise" which involve the issues resolved by the Court of Appeals. (Amicus Brief at 2). It is important to remember that this case does not involve a foreign employer seeking aid from a foreign court to limit American employee pension rights. Rather, Canadian and American beneficiaries brought this action in the foreign court to secure benefits and have thus far succeeded in obtaining relief.

Court of Appeals characterized this case as involving a "frontier" issue.

The decision below does not deprive any American workers of the protections afforded by ERISA, not even the plaintiffs in this case. It does not allow foreign states to "control the pensions of American workers without regard to ERISA." The court below specifically confined its decision to "a *quasi in rem* context where a district court has juridiction but a foreign court also has jurisdiction to entertain claims over the same alleged wrongdoing and can grant similar relief." (22a). Its holding applies only to the following limited fact-pattern:

1) There is a pension plan and trust which is governed both by United States law and by foreign law and which covers United States residents as well as foreign residents;

2) There is an *in rem* or *quasi in rem* action brought under ERISA in a United States federal court relating to the pension plan and trust;

3) The claims brought under ERISA are the type of claims over which ERISA provides for exclusive federal jurisdiction rather than concurrent jurisdiction in both state and federal court. *See* Section 502(e) of ERISA, 29 U.S.C. § 1102(e);

4) A prior-filed action is pending in a foreign court involving the same pension plan and trust brought by substantially similar parties seeking substantially identical relief under the trust and fiduciary laws of the foreign country;

5) The plaintiffs who brought the case in the United States are among those who would be affected by the foreign adjudication;

6) The law of the foreign country in which the first-filed action is brought offers substantially the same relief for pension beneficiaries;[5] and

7) The foreign action is also *in rem* or *quasi in rem.*

The convergence of these seven elements is rare.[6] Neither Petitioners nor the NHLPA has identified a *single* past case, pending suit, or potential dispute, upon which the decision below would have an impact. This *sui generis* scenario, involving what the Court of Appeals termed a "frontier issue," does not call for plenary review by this Court.

The Petition should be denied.

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5. While the New Jersey action was pending before the Court of Appeals, the Ontario Court of Justice rendered a decision which gave the pension beneficiaries virtually all of the relief which they sought in Canada and which Petitioners sought below. Indeed, the pension beneficiaries prevailed even on the lone issue Petitioners have identified in footnote 8 of the Petition as putting them "at a significant legal disadvantage in having to litigate their claims in Canada. . . ."

The NHLPA concedes that "[i]f the decision of the Ontario Court of Justice is upheld on appeal, there may not in fact be much left for the District Court in New Jersey to do." NHLPA Brief at 6.

6. Arguably, an eighth element must be present — that the foreign court has decided not to apply ERISA or United States law. In the absence of such a decision, the foreign court is capable of applying ERISA, in which case the ERISA claim is never lost. *See* discussion *infra* at note 8.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Given the virtually unique context of the decision below, it is not surprising that Petitioners are unable to cite a single decision by another Court of Appeals that genuinely conflicts with the decision below.

Broadly mischaracterizing *Princess Lida* as enunciating a principle of "abstention," Petitioners argue that a conflict among the circuits exists as to whether a court may ever dismiss a case under "abstention principles" when to do so will result in the "loss" of an ERISA claim. There is no such conflict.

Petitioners' false conflict argument hinges on a minconstruction of the decisions of the Courts of Appeals of the Second and Seventh Circuits in *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), *Central States Southeast and Southwest Areas Health & Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979), and *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2d Cir. 1977). According to Petitioners, these three cases stand for the proposition that the presence of an ERISA claim automatically precludes dismissal under any "abstention" doctrine. They argue that the decision below in this case stands for the opposite principle.

Petitioners are wrong for two reasons.

First, *Princess Lida* is not a "discretionary abstention" case. Rather, as the Court of Appeals held, when the *Princess Lida* factors are demonstrated, the district court lacks "*subject matter jurisdiction*" (15a, 21a). None of the other cases cited by Petitioners involved the application of the subject matter jurisdiction principles of *Princess Lida* to dismiss a case in favor of a foreign lawsuit.

Second, *Levy*, *Central States* and *Marshall* are wholly distinguishable, and thus do not "conflict" with the decision of the Court of Appeals below. *Central States* and *Marshall* do not even mention *Princess Lida*. The Court of Appeals for the Second Circuit in *Levy* discussed *Princess Lida*, but decided the case wholly on discretionary abstention principles unrelated to *Princess Lida*. In addition, in all three cases, ERISA's preemption of all state common law relating to pension issues precluded the plaintiffs from maintaining their claims in state court and dismissal of the later-filed federal court action would have deprived the plaintiff of *any remedy whatsoever*. Dismissal here does not have that result.

Unlike this case, *Levy*, *Central States* and *Marshall* each involved an action brought in federal court under ERISA after a state court action involving the same trust fund had already been commenced.[7] The federal court defendant in each case sought dismissal of the claim based on the prior-filed state court action. The federal court plaintiffs argued that the state court was an inadequate forum because ERISA provided for exclusive federal jurisdiction over the claim. Moreover, because ERISA preempts all common law actions relating to pension benefits, the plaintiffs in those cases could not even litigate their claims in state court on theories of common law breach of contract or breach of fiduciary duty. Therefore, if the federal actions could not proceed, the plaintiffs would have no remedy at all.

The potention loss of *any* remedy is a critical distinction which renders the reasoning of those cases inapplicable. Unlike the

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7. *Levy* and *Central States* involved state court liquidation proceedings where all of the assets of a company, including its pension fund, were under the state courts' control. *Marshall* involved pension claims brought in state court prior the enactment of ERISA, but which were still pending after ERISA went into effect.

situation in *Levy*, *Central States* and *Marshall*, plaintiffs in this case will not be deprived of a remedy if their ERISA claims are dismissed. The alternative forum in this case is not a state court, as it was there, but rather a foreign court. The exclusive jurisdiction and preemption provisions of ERISA may deprive state courts from hearing plaintiffs' claims or parallel state causes of action, but they cannot and do not preclude a Canadian court from adjudicating a parallel claim under Canadian law and providing plaintiffs with the same types of relief sought here.

There is no dispute that the Canadian court has the jurisdiction to hear and address virtually the identical claims and to provide a remedy, if any remedy is appropriate. Indeed, as pointed out above, the Canadian trial court has already rendered a decision granting virtually all the relief sought in this case. The "loss" of an ERISA claim in deference to a Canadian lawsuit does not deprive the plaintiffs of a remedy as it did in *Levy*, *Central States* and *Marshall*.[8] The Court of Appeals below correctly rejected the Petitioners' argument that these cases are apposite.

No other court of appeals has ever addressed the question presented in this case, and none is ever likely to do so. There is no genuine conflict and the Petition should be denied.

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8. At the request of the plaintiffs in the Canadian action, the "Representation Order" entered in the Canadian action indicates that the Canadian court will not adjudicate statutory claims under foreign law (*i.e.*, ERISA). In this case, where the statutory ERISA claim is the same as the claim under Canadian law and common law, this fact is of no significance. Had the representation Order not so provided, however, there would be no reason why, if a foreign court determined that a plan was governed by United States law, it could not apply United States law. It must be assumed that a Canadian court can and will apply United States pension law to the issues raised concerning a pension plan if, under the applicable choice of law rules, United States law applies. *See Canada Malting Co., Ltd. v. Paterson Co.*, 285 U.S. 413, 424 (1932) ("If the libelants are entitled to have applied the law of the United States in respect to the liability, the Canadian courts will, it must be assumed, give effect to it").

III.

THE COURT OF APPEALS' DECISION INVOLVED ROUTINE APPLICATION OF WELL-ESTABLISHED LEGAL PRINCIPLES AND ITS DECISION IS CORRECT.

The Court of Appeals correctly identified this case as one calling for the application of this Court's long-established rule that when two lawsuits are "*in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other." *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939). As this court stated in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936), "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other. . . . "

The Court of Appeals below correctly recognized that the doctrine is not confined to cases where the property has been actually seized, but applies where "suits are brought *to marshal assets, administer trusts*, or liquidate estates, and in suits of a similar nature. . . ." *Princess Lida*, 305 U.S. at 466. It applies when the claims relate to "*administration and restoration of corpus.*" *Id.* at 467. *See Donovan v. Dallas*, 377 U.S. 408, 412 (1964); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976).

Petitioners conceded in their Complaint that this case involves the administration of a trust fund and appear to concede in this Court that, but for the presence of their claim under ERISA, *Princess Lida* applies to the facts of this case and requires dismissal.[9] Again, however, the Court of Appeals correctly applied the reasoning of this Court's prior decisions and concluded that the ERISA claim alone did not preclude dismissal.

This Court has uniformly rejected the notion that litigants are entitled to a United States forum simply because they show that a foreign court will apply different law. In the context of discretionary dismissal under the *forum non conveniens* doctrine, this Court explicitly held in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981), that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the . . . inquiry." As in this case, the plaintiffs in *Piper Aircraft* argued that foreign law relating to products liability was less favorable.[10] This Court came to the same conclusion when a *forum non conveniens* dismissal had the potential to deprive a litigant of a claim under federal law. *See Canada Malting Co. v. Paterson Steamships*, 285 U.S. 424 (1932). *Canada Malting* was a case brought under federal admiralty jurisdiction. This Court affirmed dismissal of the United States action under the *forum non conveniens* doctrine, despite the fact that the plaintiff might not be able to rely on United States admiralty law in the foreign court. The Court of Appeals for the First Circuit in *Howe v. Goldcorp Investments, Inc.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992), recently applied these principles. The court in *Howe* correctly determined that the "loss" of a claim for securities

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9. By contrast, the NHLPA argues that *Princess Lida* does not apply under the facts of this case. On the contrary, both this case and the Canadian action are suits to marshal assets, to administer a trust fund, to restore money to the "corpus" of a fund, and to reallocate the corpus of a trust fund. Both sets of plaintiffs seek removal and replacement of the Trustee. Clearly, both cases primarily seek affirmative relief involving allocation and distribution of trust assets. Indeed, the Canadian court provided for the appointment of a master to oversee allocations of surplus to purchase pension benefits for participants. This is precisely the type of case to which *Princess Lida* was intended to apply.

10. Here, there is not even evidence that foreign law is less favorable. *See* the NHLPA's concession, Br. at 6 that "[i]f the decision of the Ontario Court of Justice is upheld on appeal, there may not in fact be much left for the District Court in New Jersey to do."

fraud under the federal securities laws did not preclude dismissal under the *forum non conveniens* doctrine, where the foreign jurisdiction provided similar legal protections.

The reasoning of these cases applies with equal force here. The potential — not even demonstrated in this case — that litigation in a foreign forum will result in an unfavorable change in law, does not preclude dismissal.[11]

The decision of the Court of Appeals below was correct. The principles of *Princess Lida* require dismissal of the New Jersey action and the presence of an ERISA claim does not change the result. This is especially true here, where the plaintiffs are represented in a similar lawsuit in a foreign jurisdiction in which it is undisputed that the same relief is available.

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11. While Petitioners assert that ERISA provides them with "unique" protections, the fact remains that the issue before any United States or Canadian court hearing this dispute would be the interpretation and construction of the pension plan documents, a matter Canadian courts are just as equipped to do as United States courts and on which plaintiffs have already prevailed at the trial court level in Canada.

CONCLUSION

For all the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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